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Supreme Court of the United States
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ESTEBAN ORTIZ, *et al.*,
Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT CLASS REPRESENTATIVES AHEARN, *ET AL.*

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COUNTER-STATEMENT OF THE CASE

Law professors develop hypothetical facts to illuminate selected principles of law for their students. Courts of law, however, find the actual facts and then determine the legal principles to be applied. Petitioners and their *amici*, in their zeal to discredit the detailed findings and conclusions of the District Court twice approved by the Court of Appeals, disregard the record, grossly misstate the facts and distort the context of this case well beyond fair advocacy.

In the summer of 1993, the ominous situation faced by the members of what would become the *Ahearn* class was not hypothetical. It was very real and fraught with financial peril for each of the many tens of thousands of men and women who had worked with Fibreboard asbestos from the 1920's through the 1970's, but had not yet succumbed to debilitating illness or death and brought claims. CA 231a-232a, 357a-358a.[1]

On August 26, 1993, the day before settlement in principle was reached, the families of those thousands of class members had *no* prospect of any meaningful recovery from Fibreboard absent a favorable resolution of Fibreboard's then-ongoing insurance disputes. CA 42a, 277a. Fibreboard's $235 million in assets were already dwarfed by well over $1.2 billion in unpaid settlement amounts owed to earlier asbestos victims. CA 75a, 302a-303a. In the absence of substantial additional funds, all of Fibreboard's asbestos victims could expect to receive little more than pennies on the dollar. CA 75a, 357a-358a.

Yet, on August 26, 1993, there was a real hope that the insurance disputes could all be resolved favorably enough to provide sufficient funds to make full recoveries for all a distinct possibility. CA 239a, 360-361a. This case is about whether the *Ahearn* class members had standing to participate in the determination of those disputes and, thus, in the molding of a

[1] As used in this brief, references to "CA" are to the appendix submitted with the petition for certiorari; to "JA" are to the joint appendix; to "Fib. App." are to the appendix to the brief in opposition filed by Fibreboard; to "Ins. BIO" are to the brief in opposition filed by the insurers; to "Br." are to petitioners' brief; to "Set. Def. Br." are to the brief filed by Fibreboard and the insurers; to "Sch. Br. " are to the *amicus* brief filed by certain legal ethics, etc., "Scholars"; and to "TLPJ Br." are to the *amicus* brief filed by Trial Lawyers for Public Justice.

favorable resolution with Fibreboard and its insurers, or whether - as petitioners maintain - the Constitution and substantive and procedural law required them to stand idly by while Fibreboard and its insurers continued to roll the dice and risk the class members' financial futures.

August 26, 1993 was not an arbitrary deadline. The last of a series of arguments in Fibreboard's 14-year insurance litigation was scheduled for August 27, 1993, with a decision by the California intermediate appellate court expected shortly thereafter. CA 270a, 330a. Fibreboard had hit a grand slam home run in the trial court on all of the many very difficult policy construction issues raised. CA 268a-269a. The trial court had held that policies issued to Fibreboard by Pacific Indemnity and Continental Casualty during the late 1950's had overlapping coverage, each providing $500,000 per claim coverage without aggregate limits, and that those policies triggered the responsibility of each of the insurers to all claims where exposure to asbestos occurred during or at anytime prior to the policy period – even if *none* of the exposure occurred during the policy period – and even if the manifestation of disease likewise did not occur during the policy period. CA 268a-269a. Moreover, the trial court determined that each policy's scope of coverage made it responsible for the *entire* claim, not a fraction of the claim reflecting the short term of the policy compared to the long years of exposure. CA 269a. If these rulings were affirmed, Fibreboard's two insurers both had virtually unlimited and overlapping responsibility for Fibreboard's asbestos liabilities for all claimants with any exposure to asbestos prior to March 15, 1959. As a result of the overlap, Fibreboard had been able to negotiate a policy buyout in 1992 with Pacific contingent on Fibreboard's success on the coverage appeal, a buyout which would provide funds to pay for the more limited claims against Fibreboard that were based on exposure that first occurred on or after March 15, 1959. CA 267a, 283a-285a.

However, any reduction by California's appellate courts of these expansive constructions of the policies by the trial court easily could have left Fibreboard and the *Ahearn* class members with little or no coverage. JA 140a. By definition,

Ahearn class members had not manifested illness during the policies' periods. Absent the trial court's ruling that this did not matter, there would be *no* insurance proceeds for them. Likewise, a restrictive ruling on scope of coverage alone could have reduced available coverage to a small percentage of the damages suffered. As the District Court found, there was a "significant risk" of an outcome unfavorable to the class. CA 52a, 75a-77a, 272a-276a, 357a-358a; JA 139a-141a. Set. Def. Br. 3-7, 15-16.

Moreover, overlaying the risks inherent in the policy construction litigation and lurking in the wings was a claim by Continental that Fibreboard's practice of settling asbestos claims by assigning rights under the policy breached Fibreboard's policy obligations and, as a result, vitiated the coverage *in toto*. CA 231a, 288a. This issue was being litigated in various courts where Fibreboard and settling claimants sought declaratory judgments against Continental blessing the assignments. CA 288a-290a. As of August 26, 1993, one trial court had decided the issue favorably to claimants and Fibreboard. CA 288a-290a. But that matter was on appeal and the issue was being tested in other venues as well. JA 61a-62a.

Two leading insurance law experts testified at the six-day fairness hearing that the risks to the class on appeal were acute. CA 272a-276a. Indeed, at the Fifth Circuit, petitioners agreed. Quoting the District Court's findings with approval, petitioners told the Court of Appeals that the risk of nonrecovery of insurance proceeds was "so dire as to be unacceptable if a reasonable alternative is available."[2]

No wonder, then that *no one* – not petitioners, not any other class member, not any *amicus* – contests the basic economic fairness of this $1.535 billion three-way settlement.

Then why are we here? Petitioners argue that all of this talk of an overarching unitary insurance risk is beside the point either because it allegedly came out all right in the end in the

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[2] Petitioners' Brief at the Fifth Circuit as *Amici Curiae* in *Continental Casualty Co. v. Rudd*, Fib. App. 8a.

California appellate courts anyway[3] or because it was being resolved in an "entirely separate," "independent" case in California. Br. 1, 2 n.3, 16. They and their *amici* theorize about pretextual and ephemeral conflicts among class members and insist that each class member must have been permitted to liquidate his or her tort claim individually and, presumably, to litigate the availability of insurance to pay it.

Strikingly, however, nowhere in the proceedings considering the back-up trilateral agreement – whose approval called for certification of the *identical* non-opt-out class – did petitioners see any of these supposed intra-class conflicts. And this even though the record made it abundantly clear that, under the trilateral regime, the insurance fund – even augmented by Fibreboard's non-insurance assets – was likely to be woefully insufficient. CA 358a-359a, 362a-365a. Nor have petitioners ever objected to the certification of a mandatory non-opt-out class with respect to the trilateral agreement. Petitioners have *no* quarrel with the findings below that resolution of the coverage disputes required certification of a non-opt-out class of future asbestos claimants; they simply prefer the backup trilateral agreement – even though that agreement, as the District Court found and as petitioners do not seriously dispute, provides "at least hundreds of millions of dollars" less to the class and will likely leave tens of thousands of class members, for whom petitioners now gnash their due process teeth, without any prospect of recovery at all.

As shown below, there is absolutely no reason for this Court to leave class members to this risk. Settled law establishes that the class members were permitted to participate in the resolution of the insurance disputes that were so fundamental to their future well-being and with respect to which class members could have litigated directly against the insurers. Those disputes were properly and fairly resolved by

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[3] This is not even correct. The one favorable trial court ruling on the assignment issue was reversed in 1994 and could have easily led to a finding vitiating all of Continental's coverage. See JA 485a-504a; CA 231a, 379a-380a. *See, infra*, p. 7 n.5 Likewise, several of the policy construction issues have not yet been resolved. *See* Set. Def. Br. 15. nn.** & 16 n.*.

the *Ahearn* settlement, and the class is entitled to the benefits of that settlement.

I. THE FACTS AS FOUND OF RECORD

This settlement did not evolve - as petitioners and their *amici* would imply - from a few hours activity in the Judge's kitchen where Fibreboard and its insurers bribed a "hand-picked" group of venal plaintiffs' lawyers to perform their bidding and sell out their clients. Br. 4.

Fibreboard had long presented a unique problem for asbestos plaintiffs. Previously a significant manufacturer of asbestos products, it was liable for the asbestos-related injuries of tens of thousands of persons, CA 260a-261a, 265a, but had non-insurance assets sufficient only to fund pennies on the dollar to pay for their injuries. CA 42a, 277a.

The economic reality of Fibreboard's financial situation made it imperative for asbestos plaintiffs to chart a course designed to bring about as favorable a resolution of the insurance disputes as possible. *All* asbestos plaintiffs and *all* their attorneys – including petitioners' trial counsel – uniformly came to that conclusion, and acted on that basis for years preceding this settlement. CA 278a-279a, 285a-286a.

1. The "Structured Settlement Program"

In 1988, with the coverage litigation in its ninth year before the trial court, Fibreboard had largely exhausted its insurance from sources other than Continental and Pacific and had no resources of its own to pay asbestos judgments and settlements as they came to pass. CA 285a. It proposed a "structured settlement program" ("SSP"), under which asbestos plaintiffs would receive a partial payment up-front, with a promise to pay the balance of the settlement only when and if Fibreboard achieved a favorable resolution of the coverage litigation.[4] CA 277a-279a, 285a-288a. Recognizing that there was no prospect of obtaining immediate full payment from Fibreboard, and that the only chance of ever receiving full payment lay in cooperating with Fibreboard as it proceeded with the

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[4] The deferred payments would remain owed even if Fibreboard *lost* the coverage case, but everyone understood they would receive only a few cents on the dollar, at best, if that occurred.

coverage litigation in the hope of producing a favorable result, asbestos plaintiffs and all their counsel (including class counsel and petitioners' trial counsel) accepted these terms. CA 285a-287a.

2. The "assignment program"

By 1991, however, Fibreboard lacked the resources necessary even to make the partial payments called for under the SSP, and the coverage dispute remained nowhere near resolution. To allow it to proceed with the coverage litigation – as well as to pressure Continental toward the bargaining table – Fibreboard proposed to settle with asbestos plaintiffs by "assignment." CA 40a-41a, 285a-287a, 292a. Unlike the SSP, plaintiffs would receive *no* up-front cash payment from Fibreboard at all, but would instead receive an "assignment" of an agreed-upon amount of money under the disputed Continental policy, money the plaintiffs could collect from *Continental* when and if Fibreboard prevailed in the coverage disputes. CA 39a-41a, 285a-288a.

Again, the asbestos plaintiffs' bar uniformly agreed to these assignments for the same reasons as it had earlier agreed to the SSP, subject to two conditions. CA 39a-40a, 285a-288a. First, they demanded that the assignment settlement amounts be markedly higher than the previous settlement norms to reflect the lack of cash up front and the major delays and contingencies in receiving payment. CA 286a. Second, because the ultimate collection of the assigned amounts were subject to the additional risk that the assignments themselves were invalid under the Continental policy (which prohibited settlements without Continental's consent), or, worse yet, effected a forfeiture of any coverage, the plaintiffs' bar also required that Fibreboard obtain court orders validating its right to make the proposed assignments. CA 39a-40a, 285a-287a; JA 156a. Fibreboard first sought such an order in a case entitled *Andrus v. Fibreboard*, which was then pending in a California

trial court. CA 288a-289a. The *Andrus* trial court rejected Continental's objections to the "assignments." CA 289a-290a.[5]

3. Bankruptcy was not a viable option.

As is evident from their uniform acceptance of the SSP and "assignment" program, asbestos plaintiffs and their counsel, including petitioners' trial counsel, also reached a uniform decision that forcing Fibreboard into bankruptcy was not a constructive alternative. CA 78a, 376a. The reasons were simple. Bankruptcy would *not* have resolved the asbestos plaintiffs' central problem: the insurance disputes. Those disputes would have continued unabated (with the insurers continuing to deny coverage) – and so, for that reason, would the risk to the asbestos plaintiffs of non-recovery.[6] But while bankruptcy

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[5] Continental appealed the trial court ruling. Subsequently - after the Global Settlement was reached, but before the fairness hearing before the District Court - the California Court of Appeal reversed the *Andrus* trial court's order, establishing that the assignments were indeed in violation of the Continental policy. JA 485a-504a; CA 379a-380a. As the District Court found, Continental could now assert another major defense to coverage: in addition to all of the insurers' arguments in the coverage case itself, Continental would claim that Fibreboard's breach of the policy forfeited any coverage that might otherwise be held to exist. CA 52a, 231a, 379a-380a.

[6] In addition, there was also a substantial question whether bankruptcy even could be employed to resolve the claims of future asbestos plaintiffs. Before the 1994 enactment of sections 524(g)-(h) of the Bankruptcy Code, 11 U.S.C. §§ 524(g)-(h), it was unclear whether the Code permitted the discharge of future victims' claims, and indeed no court had held that the Code did so permit. *See In re UNR Industries, Inc.*, 29 B.R. 741, 745-46 (N.D. Ill. 1983) (future claims not "claims"), *appeal dismissed and mandamus denied*, 725 F.2d 1111 (7th Cir. 1984); *In re UNR Industries, Inc.*, 71 B.R. 467, 480-481 (Bankr. N.D. Ill. 1987) (future claimants are parties in interest but may not have dischargeable claims); *In re Amatex Corp.*, 37 B.R. 613 (E.D. Pa. 1983) (future claimants not creditors), *rev'd.*, 755 F.2d 1034, 1041-1043 (3d Cir. 1985) (future claimants are parties in interest but may not have dischargeable claims); *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (future claimants are parties in interest but may not have dischargeable claims); *In re Waterman S.S. Corp.*, 141 B.R. 552 (Bankr. S.D.N.Y. 1992) (futures were claimants but not notified of bar date and so not

would not have changed the course of the insurance disputes, it would have brought the asbestos litigation against Fibreboard to a screeching halt by virtue of the automatic stay provisions, as it had done in all other asbestos bankruptcies, preventing both the orderly liquidation of claims against Fibreboard as they arose in the tort system against other defendants and the use of the assignment program as an ever-growing pressure point against Continental.

Indeed, so universal was the *rejection* of bankruptcy as a viable option by all asbestos plaintiffs and their counsel (again including petitioners' trial counsel) that as of August 1993, when the *Ahearn* settlement was being negotiated, Fibreboard could *not* have been forced into bankruptcy. Even though Fibreboard at that time had outstanding settlement obligations aggregating many times its non-insurance assets, by virtue of asbestos plaintiffs' uniform prior and continuing acceptance of the SSP and "assignment" programs, payment of Fibreboard's liquidated asbestos obligations continued to be deferred until *after* a resolution of the coverage litigation. CA 376a.

4. Negotiations for a "global" assignment settlement.

Although the "assignment" program permitted Fibreboard to survive, the coverage litigation continued unresolved. During early 1991, in order to raise the pressure still further on Continental, Fibreboard proposed the notion of a "global" class settlement by assignment, whereby asbestos claimants would look to an assigned $1 billion-plus amount of money from Continental if Fibreboard prevailed in the coverage case, and could have whatever was left of Fibreboard's non-insurance assets if it lost that case. CA 41a-42a, 292a-293a.

Fibreboard made this proposal to four members of the asbestos plaintiffs' bar. Two, Ronald Motley and Joseph Rice, were partners in the Ness Motley firm, a South Carolina firm that was involved nationwide in 50% of all asbestos claims and in virtually all major trials against Fibreboard. CA 293a, 388a-389a. The two others, Steven Kazan and Harry Wartnick, were

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discharged); *Locks v. U.S. Trustee (In re H. K. Porter)*, 157 B.R. 89, 97-99 (W.D. Pa. 1993) (future claims not "claims" for Chapter 11 liquidation).

asbestos plaintiffs' lawyers in Fibreboard's home state of California; they had been Fibreboard's main adversaries for years in a wide range of cases and the plaintiffs' bar considered them to be among the most knowledgeable attorneys with respect to Fibreboard's operations and liability profile from whom plaintiffs' attorneys solicited and followed advice in determining whether to accept Fibreboard's SSP and assignment programs. CA 277a-279a, 293a-294a. Mr. Kazan was the plaintiffs' counsel in the *Andrus* assignment settlement case. A global settlement had to involve these lawyers in order to be credible with the remainder of the plaintiffs' bar - and, more importantly, with any Court - a view that petitioners' trial counsel has acknowledged was correct. CA 293a-294a, 388a-390a; Fairness Hearing Transcript at p. 517.

For the same reasons that led all their colleagues in the asbestos plaintiffs' bar to accept Fibreboard's SSP and assignment settlements, these lawyers agreed to discuss Fibreboard's proposal. Negotiations proceeded during 1991-92.[7] CA 291a-294a. By the end of 1992, however, it was apparent that no deal could be reached, largely because neither side could devise any mutually acceptable method for dealing with the impact of potential opt-outs from a class and, thus, how to price a non-unitary settlement. CA 300a-301a.

5. Negotiations with Continental begin – and fall apart.

Although no global assignment settlement could be reached, in late 1992 Fibreboard and the Ness Motley firm did enter into a single assignment settlement of all that firm's clients' claims against Fibreboard, more than 20,000 claimants

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[7] To prepare for negotiations, counsel secured the expert assistance of the renowned epidemiologist, Dr. William Nicholson, who had previously made the most accurate forecasts of the incidence of asbestos-related disease, to project the number of future claims against Fibreboard (CA 295a-296a); hired an investment banker to evaluate Fibreboard's financial position (CA 295a); and engaged the law firm of Caplin & Drysdale, which had extensive asbestos experience but which did not represent individual asbestos claimants, to work with them and to assist with the complex procedural, insurance and tax issues that were relevant to the negotiations. CA 294a.

for more than $200 million. CA 42a, 302a-303a. Fibreboard then filed suit against Continental in the District Court, seeking the requisite order validating that settlement. CA 303a.

In February 1993, Continental announced publicly that it was prepared to negotiate an overall coverage resolution, but only on a global basis that would resolve all of its Fibreboard asbestos exposure. CA 304a. Following that announcement, at a status conference in the assignment action, the District Court suggested and all parties agreed to the appointment of Circuit Judge Patrick E. Higginbotham as a mediator. CA 43a, 304a-305a.[8]

In April 1993, Continental made an offer of $2 billion without interest payable over 25 years to settle all pending and future Fibreboard asbestos claims on a non-opt-out class basis. CA 312a. This offer – which on a present value basis was approximately one-third the amount of money that the insurers eventually agreed to pay – was summarily rejected and, because of its patent inadequacy, class counsel declined to make a counter-proposal and declared the negotiations to be at an end. *Id.*

Judge Higginbotham ultimately advised the parties that his observation of the negotiations and of the parties' dealings had convinced him that the impasse was due in large part to the parties' attempt to that point to include both pending and future claims within the class. CA 316a-317a. He viewed such a combined class as "too complex" to hold out a prospect of agreement, and suggested that the class settlement encompass only future claims, with Continental first settling pending claims separately. CA 316a-317a. In that way, the settlement values established for the pending claims could be used as a benchmark for pricing the class settlement of future claims. CA 316a-317a. Moreover, cases were then being filed and settled at such a rapid rate that neither Fibreboard nor class counsel could be comfortable with an accurate tabulation upon which to value the present cases as part of an overall settlement. JA 81a-82a, 238a-239a.

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[8] In these discussions, and in the negotiations that followed, Mr. Motley was replaced by Joseph Cox, another Ness Motley partner.

Class counsel saw great advantage to the class in this "futures-only" approach. Most of the pending claims had already been the subject of "assignment" settlements done without Continental's participation and the nominal value of these assignment settlements was higher than the prior established settlement norm. CA 64a, 286a. Thus, for Continental to settle these pending claims, it would have to negotiate a final settlement amount off inflated "assignment" values. The approach suggested by Judge Higginbotham therefore offered the opportunity to see the pending claims settled at high amounts due to the inflated "assignment" values, and then for class counsel to insist that the class of future claimants had to receive the same high amounts. As the District Court found, this "leveraging up" of the class's recovery proved to be exactly what transpired. CA 407a.

6. Class-wide settlement negotiations resume.

By August 9, 1993, the large Ness Motley assignment settlement had been renegotiated with Continental and approved by the District Court. Judge Higginbotham then recommended that the District Court designate Messrs. Cox, Kazan, Rice and Wartnick to negotiate a potential "futures" settlement and the District Court did so. CA 66a-67a, 320a.

With the potential final coverage case argument 18 days away, class counsel were confronted by the following circumstances: Fibreboard and Continental had consistently been unable to settle the insurance dispute on their own over the course of 14 years of litigation, even in situations of maximum pressure to do so. They had not settled either when the coverage case went to the trier of fact or when the assignment program or even the global assignment negotiations were underway; nor did they come any closer just a few weeks earlier in June 1993, when the impasse in global settlement discussions prompted them to make one more attempt at a bilateral settlement. CA 313a-314a.

Fibreboard was unwilling to accept any amount in settlement that would not provide it with the benefit of sufficient insurance to cover its entire asbestos exposure together with the costs of defending the claims in the tort system: for Fibreboard, a settlement short of that goal was

little better than losing the coverage case, as it would simply lead to insolvency a little later. CA 374a-375a. Conversely, Continental was unwilling to offer anything approaching Fibreboard's demand for to do so would require paying essentially all that it would have had to pay if it lost the coverage case. CA 43a-44a, 52a, 272a-276a, 307a. Absent closure with plaintiffs, the amount of the claims and the cost of their defense loomed very large to Fibreboard when it reviewed offers from Continental, just as did the prospect to Continental of direct claims against it from plaintiffs who obtained judgments against a Fibreboard without funds.[9]

The stakes were very high. To class counsel, based on advice from their experts and their analysis of future claims projections and then current settlement values, a settlement of $1.5 billion in cash would be acceptable, but not less. CA 328a. Accordingly, on August 22, but five days before the scheduled final coverage argument, class counsel rejected a cash offer of $1.3 billion from the insurers as insufficient. CA 326a-327a. The next day, in an effort to bring closure, the insurers presented their "final" offer of $1.5 billion. CA 327a. In an endgame attempt to maximize the settlement amount, even this offer was rejected. CA 328a. Negotiations continued throughout the day preceding the coverage argument, and late into the evening of August 26, 1993. CA 328a-329a. With the coverage appeal to be argued in less than 10 hours, and satisfied that the insurers and Fibreboard had offered all they were willing to put on the table, agreement in principle was reached to the insurers' and Fibreboard's final price term offer of $1.535 billion in cash. CA 328a-329a.

Because of the gravity of the insurance coverage risk, as further protection for the class, class counsel insisted as a term

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[9] Petitioners' sole effort to deal with this reality – that, as the District Court found, the coverage dispute could be settled "only" through a "unitary resolution" involving the class (CA 232a, 241a, 374a-375a) – is a mischaracterization of a few lines from the extensive testimony of Fibreboard's counsel at the fairness hearing, taken out of context. *See* Set. Def. Br. 19 n.*. The same counsel testified that Fibreboard and Continental were never even close to resolving the dispute together, JA 76a-77a, as did Continental's counsel. JA 225a-227a, 293a-294a.

of any settlement that the insurers and Fibreboard agree to what they could not agree before: a separate trilateral settlement of the coverage dispute among Fibreboard and its two insurers to operate as a "back-up" in the event that the class settlement were successfully challenged (the "Trilateral Agreement"). CA 329a-330a. Fibreboard objected to this condition because the insurers declined to pay any more for future claims under a Trilateral Agreement than the same $1.525 billion they had agreed to pay for those claims under the class-wide settlement,[10] CA 330a, which to Fibreboard was far from sufficient to cover its entire asbestos exposure together with the costs of defending all plaintiffs' claims in the tort system. CA 362a-365a.

On August 27, 1993 – on the same afternoon as the coverage appeal was being argued – Fibreboard at last conceded this point because *and only because* class counsel made it clear that they would not otherwise enter into the class-wide settlement, and because *and only because* the Trilateral Agreement was simply to be a "back-up."[11] The parties then announced to the District Court that agreement in principle had been reached on the basic terms of a class-wide settlement (the "Global Settlement"). CA 329a-331a.

Although the "back-up" Trilateral Agreement now ensures that the coverage dispute will not proceed even if the Global Settlement is not approved, it does not eliminate the risk posed to the class by the coverage dispute. CA 358a-359a, 361a-366a. As both lower courts expressly found, the Trilateral Agreement

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[10] The insurers did agree to pay an additional $475 million under the trilateral agreement to cover claims of "unsettled presents" – persons who had already filed lawsuits against Fibreboard, but who had not settled or gone to judgment. These claims were to be resolved by the insurers separately outside the class-wide settlement.

[11] The record and findings are crystal clear that Fibreboard relented and agreed to the Trilateral Agreement *only* as the price to secure the Global Settlement. CA 329a-330a; JA 84a, 111a-112a. Petitioners' assertion before this Court that "[t]he Global Settlement was not necessary to overcome [the] stumbling block[s]" to a Trilateral Agreement (Br. 9 n.9) is without any factual basis whatever.

would provide far less money to the class than does the Global Settlement, and will likely leave an enormous number of class members without any compensation at all. CA 358a-359a, 361a-366a. Set. Def. Br. 19-21. In particular, the District Court *specifically* rejected petitioners' assertion here that "the monies in the Trilateral Agreement would be sufficient" to pay all class members "indefinitely, perhaps forever" (Br. 9), relying on the same Fibreboard statements that they invoke here. CA 358a-359a Instead, the District Court found that the *complete* record demonstrated that the class will receive "hundreds of millions of dollars less" under the Trilateral Agreement than under the Global Settlement, and that "there is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non insurance assets) would leave a 'late comer' component of the [class] without compensation." CA 359a, 361a-362a. This conclusion was supported by Fibreboard's counsel who testified that for Fibreboard to stay viable under the Trilateral regime it would somehow have to reduce existing settlement values in half, and, in the process, spend more than half the funds on defense costs. JA 87a-89a, 123a.

It took Fibreboard and the insurers until October 12, 1993, weeks after the announcement of the agreement in principle, to reach a definitive Trilateral Agreement. CA 332a-335a. It was only then that the parties began to turn their tentative agreement in principle into a definitive Global Settlement. CA 335a. The ensuing negotiations included, in particular, lengthy negotiations of the "Trust Distribution Process" ("TDP"), the procedures by which individual class members would obtain resolution and payment of their claims. CA 335a-336a, 346a; JA 723a-766a. These negotiations took months, and were not finally completed until December 23, 1993, when the parties signed a definitive, written Global Settlement. CA 335a-336a; JA 626a-793a.

II. THE GLOBAL SETTLEMENT

Under the Global Settlement, $1.535 billion from the insurers and Fibreboard is channeled to a Trust established to administer and pay individual class members' claims. JA 632a-634a; CA 49a, 331a. The Trust is managed by three independent trustees, two selected by representatives of the class members

and the third selected jointly by Fibreboard and the insurers. JA 709a-710a; CA 49a.

The Global Settlement does not itself liquidate or set the amount of any individual class members' claim, nor does it deny compensation to any claim for which Fibreboard could otherwise be held liable in the tort system. Instead, it only establishes a fund out of which claims may be speedily and efficiently paid – while at the same time preserving injured persons' ultimate right to resort to the tort system. CA 50a, 346a; JA 725a-727a. Under the TDP, as in the tort system, a claimant first presents the Trust with certain basic information: medical diagnoses, conditions of exposure to Fibreboard asbestos and financial data. JA 728a. Unlike the tort system, the Trust *must* then make a settlement offer to the claimant in an amount based upon all historically relevant individual characteristics of the claim revealed by the information provided by the claimant. JA 730a, 765a-766a. Unlike the settlement invalidated by this Court in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), the TDP does *not* constrain the claimant's recovery by setting ranges of settlement values for particular diseases, by prohibiting inflation adjustments or by denying recovery altogether for certain claims.

If the claimant and the Trust do not reach a settlement, non-binding mediation and arbitration (binding or non-binding, at the claimant's election) ensue. CA 346a; JA 731a, 734a-736a. If non-binding arbitration fails to produce an agreement, and following a settlement conference with a district judge or the judge's representative, if the claimant still remains unsatisfied, he or she may then file suit against the Trust in the tort system. JA 736a-741a. In such a suit, recovery is limited to the same $500,000 overall limit as applies to consensual resolutions with the Trust, punitive damages and interest may not be recovered against the Trust and claims are limited to Fibreboard's several share of liability. JA 749a, 753a-754a.

In all cases, to maximize the amount of money that class members' actually receive, plaintiffs' attorney's fees are limited to 25% of the client's settlement, after recovery of costs, far below the norm in the tort system. JA 761a. Paralleling results in the tort system – where, in most major jurisdictions,

asbestos plaintiffs must wait at least three to five years after filing cases before their claims are resolved – claims resolved by agreement are paid over three years; claims that are tried may be paid over a longer interval. CA 346a; JA 747a-748a. Finally, through "spendthrift provisions" limiting the Trust's assets that can be paid out in any given year to annual income and an aliquot portion of principal, the TDP provisions seek to protect assets so that they will be equally available to compensate class members whose injuries develop in the future. CA 347a; JA 748a-749a, 762a-764a. In the event that current settlement obligations in any year exceed these "spendthrift" limits, payments are prioritized so that the sickest claimants are paid first, with any unpaid amounts carried over to the next year. JA 745a-747a.

Petitioners have *never* challenged the substantive fairness of the Global Settlement as a whole. Instead, they complain about a few extremely limited terms in isolation, ignoring the class's need to enter into a settlement to avoid the enormous risk posed by the coverage disputes. They complain that the $1.535 billion settlement amount includes only $500,000 directly from Fibreboard and does not include the approximately $235 million of Fibreboard's remaining equity. Br. 7. However, the class's concern is not who pays the money but whether the amount is enough. Indeed, where a tort defendant has insurance coverage, the settlement payments routinely come from the insurer and not from the defendant itself. That is why people buy insurance. The proper question is thus whether the $1.535 billion settlement figure is fair – and petitioners do not contest the lower courts' findings that it is.

Equally immaterial are the outer limits on recovery against the Trust that petitioners protest. The District Court expressly found that each of these derived – not from any attempt artificially to limit class members' recovery – but from a desire that the TDP reflect historical recoveries against Fibreboard under the tort system so that a few windfall awards would not prematurely exhaust the Trust's assets. CA 372a-373a. For example, the $500,000 cap on recovery reflects the facts that (a) of the more than 100,000 claims settled by Fibreboard prior to the Global Settlement, only 12 individual settlements exceeded

$500,000, and (b) $500,000 is the maximum amount payable to each claimant under the insurance policies to which claimants had to look for payment. CA 373a. The prohibition on punitive damages against the Trust reflects the fact that, with possibly one $40,000 exception, Fibreboard *never* paid punitive damages in the tort system.[12] CA 372a; JA 93a.

In short, unlike many settlements where class members receive a small fraction of their damages, or under the Trilateral Settlement where half the funds would be spent on transaction costs, the outer limits on recovery here, as the District Court found, are "small" and "not significant," and should have at most a minimal impact in practice on what individual class members actually receive. CA 372a-374a. Apparently, petitioners would have had the class roll the dice in the coverage dispute to avoid these minimal limits. Common sense directed otherwise.

SUMMARY OF THE ARGUMENT

Petitioners' litany of arguments all boils down to one thing. Class members – as a matter of their own rights, no less – could do nothing to protect themselves against the risk of the coverage dispute. They had to sit helplessly on the sideline while Fibreboard risked and potentially lost their only source of meaningful recovery; they simply had no alternative.

The source of this purported rule of law, however, is as unclear and elusive as its impact would be harmful to the class. Although petitioners invoke a wide variety of legal doctrines, they assiduously avoid relating any of them to the actual facts of this case. Instead, their brief is a series of generalized

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[12] Unlike certain other asbestos defendants, it has traditionally beenvery difficult for plaintiffs to establish a case for punitive damages against Fibreboard. CA 261a. The District Court also made express findings regarding the minimal effect of the remaining outer limits on recovery, finding that the elimination of interest against the Trust reflects the fact that claims will be resolved far faster and far less expensively to the plaintiff than the tort-system norm and that the limitation to several liability in suits against the Trust reflects the fact that the overall settlement amount (and hence the recoveries class members should receive) *already* reflects Fibreboard's potential joint-and-several share of other asbestos defendants' liability. CA 372a-374a.

statements of law strung together with an effort to rewrite the facts so as to equate this case with the totally different class settlement invalidated in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

1. Petitioners' principal argument is essentially a contention that, because the *Amchem* class action settlement did not meet the requirements of Rule 23(a), the Global Settlement necessarily fails to do so as well. This totally ignores the fundamental differences between this case and *Amchem*: the existence here of the coverage disputes and each class member's identical need to participate in an action that favorably resolved them. Indeed, petitioners eventually concede that the class in this case did have sufficiently common claims and interests to have participated in a class resolution of the coverage disputes. Br. 16. Their ultimate argument then reduces to a contention that these concededly common claims and interests were somehow not pleaded artfully enough in the complaint (Br. 16-17.), a contention that both mischaracterizes the complaint and, in any event, supplies no adequate reason for this Court to throw out an indisputably fair $1.535 billion settlement and put tens of thousands of class members back at grave risk. 2. Likewise, petitioners' main Article III argument consists of a collection of irrelevant boilerplate about how a "feigned," non-adversarial suit does not meet the Case or Controversy requirement. Br. 47-48. They totally fail to explain how the parties here – who have been on opposing sides in litigation for almost two decades, and who obviously have conflicting interests as to whether, how much and by whom class members' claims get paid – can possibly be deemed non-adversarial. Their argument that this case is "feigned" because the parties did not intend to litigate the personal injury claims alleged in the complaint (Br. 45-46) is simply a reprise of their contention that the class's claims with respect to the insurance disputes – which were clearly the central focus of this settlement – were inadequately pleaded.

In substance, petitioners' argument is that the "exposure-only" class members do not have sufficient "injury" to participate in the class settlement here. This argument is meritless. The exposure-only group of class members would

be, if anything, among those *most* injured by a continuation of the coverage disputes (or by operation of the back-up Trilateral Agreement), since whatever funds might be available would likely be long exhausted before the physical diseases of many of them become manifest. The notion that they cannot participate in a class action whose entire purpose is to resolve this risk in order to protect their ability to recover for injuries they will subsequently develop flies in the face of all precedent. Indeed, the time for these class members to act to protect their rights was in 1993 when the settlement was reached – not years later when their physical diseases appear, but when the source of recovery might no longer exist.[13]

ARGUMENT

I. THE COURTS BELOW CORRECTLY DETERMINED THAT THE PREREQUISITES OF RULE 23(a) ARE MET.

A. Legal Framework

Rule 23(a) states four threshold requirements applicable to all class actions, three of which petitioners contend are not met in this case: (a) commonality: "questions of law or fact common to the class"; (b) typicality: the "named parties' claims or defenses [must be] 'typical of the class'"; and (c) adequacy of representation: the "representatives 'will fairly and adequately protect the interests of the class.'" *Amchem*, 117 S. Ct. at 2245 (quoting Fed.R.Civ.P. 23(a)). As this Court has described these three requirements:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the

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[13] The remainder of petitioners' arguments concerning Rule 23(b)(1)(B), due process and notice are addressed in the brief filed by the settling defendants, and will not be separately discussed here.

> adequacy-of-representation requirement, although the latter requirement also raises concerns about . . . conflicts of interest.

General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982).

In assessing whether these requirements are met with respect to a class action settlement, moreover, the settlement should be taken into account. As this Court held in *Amchem* – rejecting the Third Circuit's contrary view that the settlement must be ignored for that purpose – "settlement is relevant to a class certification," "is a factor in the calculus," and it is "altogether proper" to take the settlement into account in determining whether the Rule 23(a) requirements are met. 117 S. Ct. at 2248, 2249. As to the weight to be given a settlement, *Amchem* held only that the fairness of a settlement may not be used to replace the Rule 23(a) and (b) requirements through the shortcut rule "that if a settlement is 'fair,' then certification is proper." *Id.* at 2249.

B. The Fundamental Differences Between This Case And *Amchem*.

Petitioners' efforts to demonstrate that the courts below erred in concluding that the class meets the Rule 23(a) requirements rest almost entirely on an attempt to portray this case as a carbon copy of *Amchem*. As the Fifth Circuit determined, this portrayal consists of a remarkably superficial recount of the two cases.

1. *Amchem* involved a class settlement resolving the claims of "hundreds of thousands, perhaps millions of individuals" having in common nothing beyond "past exposure to asbestos products manufactured by one or more of 20 companies." *Amchem*, 117 S. Ct. at 2237. No reason was offered why these persons had any need for a class resolution of their claims: in particular, no contention was made that class members would lack an adequate source of recovery if permitted to continue to proceed over time with individual actions. *See id.* at 2249 n.19. Instead, class certification was sought under Rule 23(b)(3) not on the basis of class members' needs, but rather (as in Rule 23(b)(3) class actions generally)

simply upon claims of increased "systemic efficiency" over individual adjudications in the tort system. *Id.* at 2246.

This notwithstanding, the settlement did "'more than simply provide a general recovery fund'" for class members' benefit; it instead made "essential allocation decisions designed to confine compensation and to limit the defendants' liability," decisions that "necessarily favor[ed] some claimants over others." *Id.* at 2243, 2251 (quotation omitted). For example, the *Amchem* settlement apportioned "individual damages" by specifying a range of damages payable for each disease type. CA 58a & n.8; *see Amchem*, 117 S. Ct. at 2240. The settlement did not provide for inflation adjustment of these ranges, and imposed "case flow maximums" capping the number of claims payable for each disease in a given year. *Amchem*, 117 S. Ct. at 2240. And it extinguished a wide variety of claims without any compensation at all, even if those claims were otherwise recognized under applicable state law. *Id.*

Finally, "[c]lass members, in the main, [were] bound by th[is] settlement in perpetuity, while [the] defendants [could] choose to withdraw from the settlement after ten years." *Id.* at 2241. A "back-end" opt-out right, whereby a class member could exit the settlement and sue in the tort system upon the subsequent manifestation of injury, was limited to a "small number of class members – only a few per year." *Id.* In brief, this Court held that the *Amchem* settlement impermissibly took a class of persons with virtually no common interests and no common need for a class resolution, and imposed upon them a class-wide resolution of a host of matters on which their interests sharply diverged.

2. The Global Settlement in this case is different on every level. CA 2a-3a, 57a-58a & nn.7-8. Class members here shared – not simply past exposure to a single defendant's asbestos products – but also the "real and enormous" risk arising from Fibreboard's coverage disputes. CA 76a. *All* class members "faced the real possibility" that an adverse decision in the impending appeal in the coverage litigation would render Fibreboard "insolvent simply on the basis of claims already settled" and leave them no source of recovery whatever. CA 75a. *All* class members accordingly shared an

"identical" need for a class resolution to avoid this risk. CA 3a, 57a-58a.

As the Fifth Circuit found, the class resolution in this case was thus "undisputedly driven" – not, as in *Amchem*, by a search for alternatives to the tort system – but by this common and overriding need of the class. CA 75a, 57a-58a. Class certification was accordingly predicated not on Rule 23(b)(3), but on the very different provisions of Rule 23(b)(1)(B), which provides for class treatment where class members' pursuit of individual actions would create a risk of prejudice to other class members' claims. CA 2a, 72a-85a.

Critically, as the Fifth Circuit put it, while the Global Settlement resolves the risk to class members by providing an enormous and unquestionably fair amount of "money and an equitable distribution process," it does not "award damages to individual victims" or "make any determination" of the "amount" of money to which they are entitled, and it does not deprive class members of the right to control their individual claims. CA 57a-58a, 85a, 50a. Unlike the *Amchem* settlement, it sets no ranges of recoveries for particular diseases and makes "no allocation or difference in award, according to nature or severity of injury"; individual recoveries will instead be subsequently determined on an "individual" basis as they arise through non-binding proceedings with the Trust, which will consider all historically relevant individual factors and circumstances. CA 2a, 49a-50a, 57a-58a & n.7, 337a, 346a. And if individual claimants are dissatisfied with their proposed recovery for any reason, they have an absolute "back-end" right to litigate their claims in court, with the Trust substituting for Fibreboard as the defendant. CA 50a, 58a n.7, 346a.

The Global Settlement, in marked contrast to *Amchem*, thus: involved a class sharing an overriding common interest "regarding insurance coverage for the class's injuries and establishment of an equitable distribution process"; resolved only those "commonly held questions"; and did not resolve the matters – what each class member will actually recover – as to which class members' interests may differ. CA 57a-58a & n.8; *see also* CA 2a-3a.

As set forth below, the courts below correctly determined that these critical factual and legal distinctions between *Amchem* and this case totally belie petitioners' attempt to equate the two.

C. Commonality and Typicality

Petitioners make essentially two arguments with respect to the Rule 23(a)(2) and 23(a)(3) commonality and typicality issues. First, by dint of selective quotation from the Fifth Circuit's opinions, petitioners claim that the Fifth Circuit has refused to apply *Amchem's* holding that the commonality and typicality requirements cannot be satisfied simply by reference to the class's interest in obtaining a favorable settlement. They further argue this refusal has thus so "tainted" the Fifth Circuit's conclusion that those requirements were met in this case as to require reversal. Br. 13-15. Second, petitioners contend that the insurance disputes that are at the heart of this case are, in essence, irrelevant because those disputes were the subject of other cases and were not adequately pleaded in this case. Br. 15-18.

Petitioners' first contention is based on a mischaracterization of the Fifth Circuit's decision. As described above, the Fifth Circuit's initial opinion in this case repeatedly noted the class's common interests in resolving the risks to all class members presented by Fibreboard's insurance disputes (*see, e.g.*, CA 57a-59a & n.8, 75a-76a). On remand, the Fifth Circuit incorporated its prior discussion of the common interests of the class by reference. CA 2a-3a. Because the insurance disputes, and the class's interest in eliminating the risks arising therefrom, indisputably pre-existed the settlement, the Fifth Circuit did not reject *Amchem* in relying on them.

In any event, the issue before this Court is whether the record below supports the findings of the District Court, affirmed by the Fifth Circuit, that the Rule 23(a)(2) and (a)(3) requirements were met by the class here.

1. As petitioners do not and cannot dispute, all class members had existing or potential future claims against Fibreboard arising out of their exposure to its asbestos

containing products, all class members were identically at risk of no recovery from Fibreboard as a result of the coverage disputes, and all had identical claims that the insurers owed coverage notwithstanding those disputes. Given this, the class's contentions and interests are clearly sufficiently "interrelated" (*General Tel. Co., supra*) to meet the commonality requirement.[14]

Likewise, the claims of the named representatives that the class is entitled to the benefit of Fibreboard's insurance proceeds notwithstanding the coverage disputes are "typical" of the claims of the rest of the class. Each class member faced an identical risk from a continuation of the coverage disputes, that each class member's existing or future personal injury claim against Fibreboard would be identically worthless if Fibreboard were to lose that dispute. Each class member thus had an identical claim that the insurers owed coverage notwithstanding the coverage dispute, and an identical stake in an action designed to protect their common interests under the policies. These claims, moreover, could have been litigated by the class absent the Global Settlement: under California law, which governs the California insurance policies at issue here, tort plaintiffs have a cognizable interest in a tort defendant's insurance policies, and may bring an action even prior to obtaining a judgment on their tort claims in order to establish that an insurer owes coverage on any liability they may establish.[15]

Unlike in *Amchem*, moreover, these common and typical claims and interests "preexist[ed]" the Global Settlement, and do not arise from the settlement itself. *Amchem*, 117 S. Ct. at

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[14] Compared with the "predominance" requirement of Rule 23(b)(3) at issue in *Amchem* – which does not apply to this Rule 23(b)(1)(B) case (*see Amchem*, 117 S. Ct. at 2249 n. 19) – the commonality requirement is "far [less] demanding." *Id.* at 2250.

[15] *See, e.g., Omaha Indem. Co. v. Superior Court*, 258 Cal. Rptr. 66 (Cal. App. 1989); *General Ins. Co. of America v. Whitmore*, 45 Cal. Rptr. 556 (Cal. App. 1965); *see also Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 795 (Cal. 1993); *Shapiro v. Republic Indem. Co.*, 437 P.2d 289 (Cal. 1959).

2249. The class's common interests in resolving the coverage disputes to ensure a source of recovery arose long before the Global Settlement was negotiated. This is not a case like *Amchem*, where the settlement resolved issues as to which class members had very little in common beforehand, and the settling parties then tried to bootstrap their way past the predominance requirement by positing the "settlement's fairness" and class members' generic interests in receiving "fair compensation" as "common" questions. *Id.* at 2249.

2. Petitioners ultimately do not contest any of this. Indeed, they expressly concede that "perhaps the class could have" participated in a class "settlement" of the coverage dispute. Br. 16. Instead, they assert that this conceded commonality and typicality somehow does not suffice because of an alleged pleading inadequacy: they insist that the complaint does not specifically plead claims to secure insurance coverage, that the complaint's repeated allegations regarding the coverage dispute and the risk it posed to the class are "mere background," and that the "*only* claims pleaded are garden variety asbestos personal injury, money-damages claims." *Id.* (emphasis in original).

This, to begin with, simply misrepresents the complaint. The entire complaint (which may be found at CA 552a-566a) is replete with claims regarding the injury posed to all class members by a continuation of the coverage disputes and the class's need for a favorable resolution of those disputes through a class settlement. On any fair reading, the complaint alleges that Fibreboard is liable for the class's present and future injuries; that, as a result of the coverage disputes, Fibreboard may not have any money to pay class members; that the continuation of these disputes thus places class members at great risk; and that favorable resolution of the coverage disputes on a class basis is necessary to remedy that risk in order to ensure class members of a source of recovery.[16]

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[16] *See, e.g.*, CA 558a-559a (¶ 18: "Fibreboard's assets are so limited . . . that Fibreboard cannot pay, absent insurance proceeds, all future asbestos-related claims. Recovery by earlier litigants will likely exhaust Fibreboard's available and projected assets, and would, as a practical

And although Fibreboard's insurers were not initially parties defendant, they became so on the very day the complaint was filed by moving to intervene. CA 567a-570a.

Petitioners' real argument here is not, ultimately, over alleged deficiencies in the class complaint – which could, after all, be cured by amendment of the pleadings if necessary.[17] Rather, their contention is that the class representatives – no matter how the complaint is pleaded – cannot settle "future" claims because they allegedly "by definition" could not assert such claims in the District Court when the complaint was filed. Br. 14 n.10. This argument reduces to the contention that class actions can *never* include future claims, contrary to settled law

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matter, substantially impair the ability of later claimants to obtain relief"; ¶ 22: "Absent indemnification from Continental or Pacific, Fibreboard is likely to be rendered insolvent by pending asbestos litigations, and unable to compensate Class members for asbestos-related injuries"; ¶ 24: "Unless Fibreboard settles its coverage disputes in a manner that ensures indemnification for asbestos claimants against Fibreboard, there is a substantial risk that Fibreboard will be rendered insolvent and asbestos claimants against Fibreboard will be left with no relief whatsoever".)

[17] The class could have recited a slightly different complaint producing exactly the same outcome, seeking a declaratory judgment that the insurers owed coverage on the class's claims notwithstanding the coverage dispute. There is no question that the class would have standing to litigate such a claim, both under governing California law and the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* cases cited at p. 24 n.15, *supra*; *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1332-33 (11th Cir. 1989). There is also no question that certification of a non-opt-out class would be appropriate on that claim: the class would have a strong and unitary interest in the insurance policies and the outcome of the coverage dispute; and that interest would have to be litigated on a mandatory class basis either under Rule 23(b)(1)(B) – because individual adjudications of the coverage issues would be dispositive of the class's claims – or under Rule 23(b)(2), which provides for a non-opt-out class in declaratory judgment cases where the judgment would be generally applicable to the class. Indeed, this Court has the power to deem the complaint here amended in this fashion. *See* p. 45 n.33, *infra*; *Chandler v. Miller*, 117 S. Ct. 1295, 1300 n.2. (1997).

permitting the class or representative adjudication and settlement of claims of future schoolchildren, future prisoners and unborn heirs. *See* p. 50 & nn.36 & 37, *infra*. The argument also flies in the face of this Court's decision in *Matsushita Elec. Ind. Co. v. Epstein*, 116 S. Ct. 873 (1996). In *Matsushita*, this Court held that class representatives in fact *can* – as part of an overall settlement of claims properly before the court – settle claims that were not only not pleaded in the complaint, but over which the forum court could not have asserted jurisdiction even if the claims had been pleaded.

Petitioners' attempt to distinguish *Matsushita* as involving a case where the two sets of settled claims "arose from the identical factual predicate" (Br. 14 n.10) is unavailing. The nexus here between the class's claims for a determination of their rights to Fibreboard's disputed insurance – which petitioners concede the class could have litigated and settled on a class basis (Br. 16) – and the class's future personal-injury claims against Fibreboard is if anything *closer* than the nexus among the claims at issue in *Matsushita*. Indeed, so interrelated are the two sets of claims that the class's claims with respect to Fibreboard's disputed insurance could *not* have been settled without simultaneously settling the class's future personal-injury claims against Fibreboard that the disputed policies were claimed to insure - the insurance proceeds could not be turned over by the insurers to the class without Fibreboard's consent, and Fibreboard was not about to supply that consent while leaving intact the tort claims against it that the insurance would otherwise potentially have covered. In essence, under the *Ahearn* Global Settlement, the class is agreeing to trade its ability to sue Fibreboard on future personal-injury claims in return for an assured source of recovery out of the disputed insurance – and is doing so because Fibreboard's necessary consent to that settlement could not otherwise be obtained and because without that settlement the class might well find itself without any source of recovery at all. Petitioners are entirely silent as to what rule of law prevents the class from doing so.

3. Petitioners also contend that typicality does not exist because class members allegedly have diverse interests on

matters *not* affected by the Settlement, such as the import of individual circumstances (*e.g.*, differences in state law and exposure history) bearing on the amount of damages each individual class member will ultimately receive. Br. 17-18. As the Fifth Circuit correctly pointed out, however, the Global Settlement – unlike the settlement in *Amchem* – does not resolve the effect of these variations in individual circumstances. CA 57a-58a & n.7. Those circumstances will instead be considered fully by the Trust, in accord with their demonstrated significance in the tort system, when it makes settlement offers to individual claimants; and individual class members who may disagree with the Trust's assessment of their individual circumstances retain an absolute "back-end" right to litigate the effect of those circumstances in the tort system under applicable state law.[18]

There is absolutely no support for petitioners' notion that alleged atypicality regarding these matters *not* resolved by the Settlement precludes class certification as to the matters that the Settlement does resolve and as to which typicality does exist. To the contrary, this Court's repeated statements in *Amchem* that a settlement should be considered in assessing

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[18] Petitioners' contention that the *Amchem* settlement likewise did not resolve individual damages badly mischaracterizes that settlement. Their assertion that the *Amchem* settlement did not "pre-ordain the amounts to be awarded" (Br. 17) is correct only in the most literal sense. Although the settlement did not delineate a specific dollar amount that each specific class member would receive, it set ranges of compensation for each disease type and provided that class members could get immediate recovery only if they agreed to accept the very bottom end of the range. *Georgine v. Amchem Prods. Inc.*, 157 F.R.D. 246, 276, 337 (E.D. Pa. 1994), *rev'd*, 83 F.3d 610 (3d Cir. 1996); *see Amchem*, 117 S. Ct. at 2240. And the settlement greatly limited the back-end opt-out right to only a "few" class members "per year," so that dissatisfied claimants would generally have no other option. 117 S. Ct. at 2241. The Global Settlement here, by contrast, sets no recovery ranges for any disease type, and the across-the-board $500,000 outer limit it does set is for recovery from a single defendant (as compared with the 20 defendants covered by the *Amchem* settlement) and reflects demonstrated historical tort-system realities for claims against that defendant. *See* pp. 16-17, 22, *supra*.

class certification mean precisely that a settlement class need satisfy the commonality and typicality requirements only with respect to those matters actually resolved by the settlement, and that courts assessing a proposed settlement class thus "need not inquire" into matters *not* resolved by the settlement. *Amchem*, 117 S. Ct. at 2248 (holding that the Rule 23(b)(3)(D) inquiry, which focuses on whether a class action would be manageable if tried, may be ignored in the settlement context).[19]

D. Adequacy of Representation

Petitioners, joined by an *amicus* group of self-proclaimed "Scholars," next contend that class counsel inadequately represented the class. Unsurprisingly, in positing a host of theoretical conflicts under which class counsel supposedly labored, neither petitioners nor the Scholars bother to relate their abstract theories to the actual facts of this case.[20] And it is these actual facts that demonstrate that the lower courts did not abuse their discretion in determining that class counsel adequately represented the class.[21]

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[19] Consideration of the settlement in this way is analogous to the provision of Rule 23(c)(4) that classes generally – including those certified for litigation – may be partially certified as to certain common issues, so long as the class resolution does not resolve individual issues and instead leaves them for future individualized resolution.

[20] Curiously, the Scholars open their discussion by conceding that the Settlement is fair, Sch. Br. at 9, but then proceed to make a variety of unsupported assertions that class counsel who in fact negotiated the Settlement had no "bargaining leverage" because they did not intend to try the case. *Id.* at 3, 23, 24. The Scholars conveniently ignore the undisputed reality that the class counsel had ample bargaining leverage provided by their ability, in the absence of a settlement with Fibreboard and the insurers, to continue to litigate individual cases against Fibreboard (for which they then accounted for some 50 percent of the total (CA 388a)) or to litigate on a class basis, if desired, the coverage disputes, see pp. 24, 26 n.17, *supra*.

[21] The courts have uniformly held that district court determinations that no subclasses were necessary and that counsel adequately represented the class are reviewable only for abuse of discretion. *See, e.g., In re Prudential Insurance Co. Sales Agent Practice Litig.*, 1998

1. The alleged conflict between currently injured and exposure-only class members.

Petitioners' primary contention reduces to the notion that because there was a conflict between currently injured and exposure-only class members in *Amchem* (*see* 117 S. Ct. at 2250-51), there must also be one here. The contention is without merit.

1. In *Amchem*, this Court rendered – not a categorical holding that currently injured and exposure-only class members may never coexist within the same class – but a decision that the particular background and terms of the settlement in that case created a conflict. *See* 117 S. Ct. at 2251. This Court held that the *Amchem* settlement terms gave rise to a conflict in that case because they imposed "essential allocation decisions designed to confine compensation and to limit defendants' liability." *Id.* In particular, the two groups had conflicting interests regarding the *Amchem* settlement's provisions prohibiting the adjustment of the ranges of recoveries for inflation, drastically limiting the number of back-end opt-outs and extinguishing certain causes of action for no compensation. *Id.* Indeed, in perhaps the clearest demonstration that it was not categorically precluding exposure-only and currently injured plaintiffs from coexisting

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WL 409156 (3d Cir. 1998) at * 23; *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997); *Clark Equipment Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986). *Compare Califano v. Yamasaki*, 442 U.S. 682, 703 (1979). (In *Amchem*, this Court did not address the issue of the standard of review because – unlike here – it was reviewing an appellate court decision that itself reversed the district court's determination.) The Scholars' argument for *de novo* review on the ground that adequacy of representation is a constitutional right proves far too much. Since a fair trial is also a constitutional right, *de novo* review of trial court rulings that allegedly made a trial unfair would be required in every case. Furthermore, even in constitutional cases, trial court findings of fact are reversible only for clear error. *Freeman v. Pitts*, 503 U.S. 467, 474 (1992); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 (1979); Rule 52a, Fed.R.Civ.P. In any event, for the reasons given below, the lower courts' decisions were correct under any standard of review.

within the same class, this Court cited approvingly the Second Circuit's decision in *In re Joint Eastern & Southern Dist. Asbestos Litig.* 982 F.2d 721 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d. 7 (2d Cir. 1993) ("*Findley*") – a case which approved a Rule 23(b)(1)(B) settlement class containing both groups without establishing separate subclasses. *See Amchem*, 117 S. Ct. at 2251.

2. Here, an equivalent focus on the actual facts of this case illustrates that the conflict identified in *Amchem* never arose. First, exposure-only and currently injured class members have a community of interest here that was totally absent in *Amchem*. Unlike the *Amchem* settlement – which, as noted above, was not necessitated by any common need of the class – the Global Settlement was "undisputedly driven" (CA 75a) by all class members' identical and overriding need to "avoid[] the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal." CA 56a, 415a. Currently injured and exposure-only class members therefore shared an identical need for a unitary class resolution to eliminate this risk: otherwise, the claims of both groups against Fibreboard would potentially be equally worthless. Rather than creating internal conflicts, the Global Settlement's principal provisions – securing over $1.5 billion of disputed insurance coverage to compensate the class – thus greatly benefitting all class members, exposure-only and currently injured alike. CA 76a, 421a. Indeed, presumably for this reason, petitioners nowhere dispute that the interests of both groups of class members were aligned as to the truly overriding issues in this case: whether to enter into a global settlement to resolve the risk posed by the coverage disputes, and whether the $1.535 billion Global Settlement amount is an acceptable price.

Second, the record further reflects that the class's undisputed common interest in successfully resolving these overriding common concerns would have been jeopardized by the interjection of the host of separate subclasses that petitioners now demand. Given the "severe deadline" (CA 67a) of the impending appeal in the coverage litigation, the settlement negotiations were charged with a "sense of

urgency," and all parties "were driven to reach a settlement before" that appeal could be heard. CA 45a. As the District Court expressly found, injection of subclasses representing special interests to fight over largely theoretical side issues over allocation of a (then-hypothetical) source of recovery would have imperiled the ability to resolve the coverage dispute prior to the decision of the coverage appeal, thereby jeopardizing the existence of a source of recovery in the first place and subjecting the entire class to a "substantial and potentially devastating risk." CA 404a, 413a-414a, 67a.

Third, the Global Settlement resolves these matters of overriding common concern to the class without including any of the aspects of the *Amchem* settlement found to create a conflict in that case (*see Amchem*, 117 S. Ct. at 2251):

- Unlike the *Amchem* settlement, the Global Settlement does not invite trade-offs between various groups of class members by fixing different amounts to be paid for any particular category of claims; instead amounts payable for individual claims are to be set by the Trust in response to all factors that are relevant in the tort system. JA 730a, 765a-766a.
- Unlike the *Amchem* settlement, there are no limits on the number of class members who can exercise "back-end" opt-out rights to litigate their claims in the tort system. If claimants are dissatisfied with the Trust's evaluation of their individual claims, they can bring those claims to court and (subject to relatively inconsequential limitations discussed below) recover any amount to which they can establish entitlement under applicable law. JA 737a-739a. As the Fifth Circuit recognized, this prospect will ensure that the Trust fully takes developments in the tort system into account in administering claims. CA 58a n.7.
- Unlike the *Amchem* settlement, there is no prohibition on inflation adjustment of settlement recoveries. The Trust may fully consider such an adjustment – and, as noted above, the prospect of being sued in the tort system will give it strong incentive to duplicate the effect of inflation in that system.

- Unlike the *Amchem* settlement, no set of claims are resolved without compensation. Any claim may be presented to the Trust, to be assessed according to all relevant factors applicable to that claim in the tort system, and litigated in the tort system by the claimant if necessary under applicable state law.

By contrast, petitioners and their supporting *amici* are able to conjure up a conflict argument here based only upon hypothetical outer limits on recovery, principally a limit of $500,000 per claim and a prohibition on punitive damages against the Trust. Br. 19; Sch. Br. 17; TLPJ Br. 10. But as detailed above, as the District Court found and as petitioners do not contest, unlike the artificial payment ranges in *Amchem*, the limits reflect demonstrated historical realities in the tort system in suits against Fibreboard, and should thus have at most a minimal impact in practice on what class members actually receive. *See* p. 16-17, *supra*; CA 372a-374a. Moreover, these relatively minor outer limits are clearly appropriate to ensure that a small number of unpredictable wild-card awards in suits against the Trust do not create a disproportionate drain on a Trust corpus that is not large enough to guarantee recovery for all claims that may be asserted against it over a large number of years. And since, by definition, no individual class member can know whether it would be his or her claim that would receive such an unpredictable wild-card award, the limitation affects all class members equally.

3. The actual record in this case thus exposes the extreme and unsupportable nature of petitioners' and the Scholars' argument. They are maintaining that – even where all class members' interests are fully aligned as to the central decision of whether to settle for the proffered amount – the existence of any hypothetical conflict about the allocation of that amount bars certification of the class as a whole: no matter how trivial that conflict may be in the context of the entire case, no matter how unlikely it may be that the hypothetical conflict will actually arise, and no matter how much subdividing the class into balkanized segments would imperil a successful resolution of those issues of overriding common concern to the class. For example, petitioners in

effect contend here that, because a few unknown and unidentifiable currently injured class members might hypothetically, against all demonstrated odds, recover more than $500,000 or punitive damages from Fibreboard *if* the coverage disputes were resolved favorably, the entire class had to be left at risk that all of the coverage might be lost because of the practical impossibility of creating subclasses and appointing new counsel for them in time to achieve a settlement.[22]

Surely the District Court did not abuse its discretion in rejecting this argument. In fact, the argument would potentially invalidate virtually every class action settlement. Class actions almost always settle for an amount less than 100% of what class members would have recovered had they been totally successful in litigation: that is why they are settlements. These settlements thus of necessity require some measure of allocation among class members of the settlement amount. As a result, different factions of the class frequently have differing interests concerning the allocation of damages, but that fact has never prevented cases from being settled on a class-wide basis. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18 (2d Cir. 1986) (intraclass conflicts over the allocation of a settlement amount are "not unusual"); *Walsh v. Great Atlantic & Pac. Tea Co.*, 726 F.2d 956, 964 (3d Cir. 1983).

For example, in securities fraud cases – where the general propriety of class-wide settlements is settled – class members who purchased stock during certain parts of the class period could often argue that they are entitled to a disproportionate

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[22] Implicitly, in turn, the absence of these limits on recovery would have created a similar "conflict" as well, since exposure-only class members would by hypothesis have had an equal complaint that the limits should have been included. Indeed, it was on the basis of such theoretical conflicts that petitioners' expert witness at the fairness hearing insisted that the District Court – with 18 days remaining prior to the coverage appeal argument – needed to divide the class into no fewer than *eight* separate groups, separately represented by eight lawyers, none of whom would have had any involvement in the negotiations to that point. JA 326a-327a.

share of the class's recovery.[23] Creative objectors can undoubtedly conjure up multiple similar "conflicts" in almost every class case. These hypothetical, tangential fights over allocation of a settlement amount should not prevent certification of the class as a whole, so long as the class's common interests outweigh the differences over allocation and the proposed settlement fairly accommodates all class members – lest classes lose the important ability to proceed as a group because of some theoretical argument over allocation that pales in significance to their community of interest overall. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1435-36 (2d Cir. 1993); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d at 18-19; *Blackie v. Barrack*, 524 F.2d 891, 908-10 (9th Cir. 1975).

Moreover, as little basis as petitioners' argument has generally, it has even less in the context of this case. Petitioners' claimed currently injured/exposure-only conflict equates to a supposed conflict between those who would win a race to the courthouse in the absence of a settlement and those who would not. To hold out *that* purported "conflict" as disabling, however, makes absolutely no sense in the context here: a class settlement under Rule 23(b)(1)(B). Although the adequacy of representation requirement applies fully in Rule 23(b)(1)(B) cases, the inquiry must be informed by the type of class certification at issue. As its language makes clear, Rule 23(b)(1)(B) calls for a unitary class resolution in the relatively rare circumstance in which allowing individual class members to maintain "separate actions" on their own would "as a practical matter" prejudice other class members' claims. In particular, Rule 23(b)(1)(B) class actions involving so-called "limited funds" will generally reflect a substantial degree of tension within the class based on who might otherwise have gone to judgment first and potentially received a disproportionate recovery. *See, e.g., Findley, supra.* Yet a

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[23] *See, e.g., Blackie v. Barrack*, 524 F.2d 891, 908-10 (9th Cir. 1975); *Tucker v. Arthur Andersen & Co.*, 67 F.R.D. 468, 481-82 (S.D.N.Y. 1975). *See also* Amicus Brief of National Association of Securities and Commercial Law Attorneys at 9-10.

major purpose of the Rule is precisely to avoid prejudice to the class as a whole based on such a race to the courthouse, and class actions under it and its historical predecessors have thus traditionally been resolved on a unitary basis. CA 81a-84a; Advisory Committee Note to 1966 Amendment to Rule 23(b)(1)(B), 39 F.R.D. 100-02 (1966). *See* Set. Def. Br. 34-46. The reason is that, in those cases involving monetary claims to which the Rule applies, the class shares a common and overriding interest – to secure and equitably distribute otherwise potentially unavailable funds among all class members, early and late claimants alike.

On petitioners' argument, then, the very predicate of many Rule 23(b)(1)(B) class actions – that the winners of a race to judgment would inequitably prejudice the interest of others – would simultaneously be grounds for a disabling intraclass conflict based on the claim of some class members to preferential treatment because of their asserted ability to win that race. This cannot be. Accordingly, this Court expressly distinguished Rule 23 (b)(1)(B) cases on this point in *Amchem*. 117 S. Ct. at 2251.[24] And it cited with approval a case in which the Second Circuit held that, in a Rule 23(b)(1)(B) setting, a conflict requiring subclassing arises between exposure-only and currently injured class members only if the latter have some "legally enforceable rights" to "a priority payment" – something that the currently injured class members do not have here. *See Findley*, 993 F.2d at 10-11.[25]

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[24] Petitioners maintain that this Court's language in *Amchem* suggests instead that the supposed conflict is "exacerbated" in the Rule 23(b)(1)(B) context. Br. 18. Although in fairness, *Amchem*'s language is not entirely clear on this point, it is submitted that – given the clear incompatibility of Rule 23(b)(1)(B) class actions with conflicts based on a race to the courthouse, and this Court's careful efforts elsewhere in *Amchem* to limit its holding to Rule 23(b)(3) classes – petitioners' reading should be rejected.

[25] Petitioners attempt to distinguish *Findley* as irrelevant on the grounds that their rights to immediate payment arise from state law, and not a negotiated plan. Br. 18 n.14. However, petitioners wholly fail to cite any law purporting to create recovery priorities among tort victims (other than the Rules Enabling Act, 28 U.S.C. §2072, which clearly does not so provide). *See* Set. Def. Br. 44-47.

4. Finally, even if there were a disabling conflict between the currently injured and exposure-only class members over allocation of the settlement amount, the appropriate remedy would be for the Global Settlement's allocation process (the TDP) to be renegotiated with subclasses. Because no one contends that the two groups had conflicting interests regarding whether to settle and the appropriateness of the $1.535 billion settlement amount, the alleged "conflict" cannot be a reason to throw out the entire Settlement. (This, in fact, was the position taken on this point by the dissenting judge below. CA 148a.) Petitioners' sole response – that, in *Amchem*, this Court voided the class certification after finding an intraclass conflict over allocation without remanding for further proceedings (Br. 20 n. 16) – ignores the fact that the Court had also determined that the class in that case also failed the Rule 23(b)(3) predominance requirement, and thus could not be certified regardless of whether subclasses were required to negotiate the allocation of the settlement amount. *See* 117 S. Ct. at 2250.

2. The remaining alleged conflicts

The remaining conflicts alleged by petitioners and the Scholars are equally without basis.

1. Petitioners briefly contend that, because the insurance policies did not originally cover claims based on first exposure after 1959, there is a conflict between class members whose first exposure to asbestos was before 1959 and those whose first exposure came thereafter. Br. 21. This contention simply ignores intervening factual developments that rendered this historical distinction obsolete and immaterial well before the Global Settlement was negotiated.

First, in 1992, Fibreboard had entered into a separate settlement with Pacific that would have provided Fibreboard with substantial funds to pay post-1959 claimants. Under this agreement, Fibreboard would have released the Pacific policy for potentially hundreds of millions of dollars, contingent upon

the outcome of the coverage case; and Fibreboard then could use those funds to pay post-1959 claims.[26] CA 416a.

Second, in April 1993, prior to any global settlement negotiations among all the parties, Continental and Fibreboard separately agreed that the total cost of any global settlement that was reached would be borne entirely by the insurers, including as to post-1959 claimants. As the District Court found, this agreement mooted the source of this claimed conflict, by requiring that the insurers pay fair value for all claimants in any global settlement, regardless of date of first exposure. CA 416a-418a, 71a.

These two agreements both did away with any real claim by pre-1959 claimants to a disproportionate share of any global settlement fund, and also gave both groups of class members the same overriding interest in a class resolution of the coverage dispute: a fact further demonstrated by petitioners' decision not to object to the Trilateral Agreement, or to demand subclasses or separate counsel in the *Rudd* case, even though the Trilateral Agreement likewise provided insurance funds that could be utilized by Fibreboard to pay both pre-1959 and post-1959 claims equally. CA 417a.[27]

2. Petitioners' and the Scholars' contention that class counsel had a conflict arising out of their prior settlement of "present" cases (Br. 22; Sch. Br. 20-23) likewise ignores the factual record. They blithely assert that these settlements made 50% of the proceeds "contingent on approval of a class settlement in this case"; that class counsel thus "owed it" to their present clients "to reach *any* class settlement"; and that – despite their implicit concession that the Global Settlement

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[26] This agreement never took effect because the amount payable under it was contingent upon receipt of an order cutting off claims by Continental against Pacific for contribution (CA 284a), and the agreement was superseded by the Global Settlement before the appropriateness of such an order was determined by the court.

[27] In any event, like the purported currently injured/exposure-only conflict, this alleged "conflict" extends only to the allocation of the Global Settlement fund – not to the decision to settle in the first place or to the overall size of the settlement amount.

is fair to the class – this "necessarily hampered" counsel in negotiating the Global Settlement. Br. 22 (emphasis in original).

The full facts are quite different. As related above, the suggestion that class counsel settle their present cases before negotiating the Global Settlement came from Judge Higginbotham, and it served to benefit the class. *See* pp. 10-11 *supra*. Moreover – contrary to petitioners' statement that the 50% contingency in these present settlements would have been satisfied by a global class settlement "on any terms whatsoever, even if those terms were unfavorable to the class" (Br. 6 (quotation omitted)) – that contingency would not have been satisfied unless the global settlement were approved as fair by the courts.[28] As the District Court found, far from creating a conflict, this provision thus gave class members and the present claimants an identical interest in a fair global settlement that would withstand judicial scrutiny. CA 406a-407a, 67a. And finally, the present settlements made 50% of the proceeds contingent – not simply upon a fair class settlement – but upon any favorable resolution of the coverage case (including a direct settlement between Fibreboard and the insurers or a Fibreboard victory in litigation). In that way, these settlements were identical to the SSP and assignment settlements that *all* asbestos plaintiffs' counsel had been entering into with Fibreboard for years. *See* pp. 5-6, *supra*. On petitioners' theory, then, all of these lawyers would have been conflicted, and the only counsel that could have been selected

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[28] Petitioners' and the Scholars' assertion that class counsel "owed", "had a duty" and "had an obligation" to the clients for whom they had settled cases prior to negotiating the Global Settlement (Br. 22; Sch. Br. 20, 21) to attempt to secure payment of the contingent 50% balance of those settlements by negotiating a separate class settlement for a wholly different group of persons is an *ipse dixit* unsupported by any authority, evidence of record, or common sense. Once those settlements were negotiated with payment provisions contingent on future litigation (or settlements) to which those clients were not parties, class counsel's representation of those clients was complete and they owed no further duty to those clients, much less a duty to undertake the representation of a class of other persons for the benefit of those former clients.

to represent the class – with just weeks remaining before the coverage case appeal – were those who had never been involved in asbestos litigation and thus had no familiarity with either Fibreboard's potential asbestos exposure or its complex insurance disputes. JA 306a-309a, 330a-333a, 336a-340a. Such a substitution would have inflicted grossly inadequate representation on the class, to its likely substantial detriment. CA 67a, 401a-404a.

3. Finally, petitioners (briefly) and the Scholars (at length) contend that class counsel were inadequate because they allegedly "gerrymandered" the class to include only future claimants. Br. 22, Sch. Br. 15-20. This contention, however, appears nowhere in the petition for writ of *certiorari*, was not raised or addressed in the courts below, and accordingly is not properly before this Court. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); S. Ct. Rule 14.1(a).

Moreover, the Scholars' assertion, without reference to or support in the record, that the reason for the exclusion of "presents" from the class was "to protect class counsel's own financial interests and the financial interests of other asbestos lawyers" in breach of class counsel's fiduciary duties, Sch. Br. 19, is both wrong and offensive.

First, notwithstanding petitioners' and the Scholars' contentions that class counsel concurrently negotiated on behalf of both their existing clients and the *Ahearn* class, the record is clear that, at the suggestion of Judge Higginbotham acting as a mediator, the Ness Motley settlement was negotiated to a conclusion before the negotiations that ultimately led to the Global Settlement commenced on August 9, 1993.[29] CA 407a-408a. Similarly, prior to August 27, 1993,

[29] While there were prior negotiations between class counsel and Fibreboard in 1991 and 1992 over a possible class assignment settlement and some preliminary discussions that included Continental in the spring of 1993 about a presents and futures global settlement, the record is clear that the only serious negotiations of the *Ahearn* settlement began in August of 1993. CA 300a-301a, 311a-314a, 320a-322a. *See* pp. 9-11, *supra*. Moreover, there is – and can be – no contention that the terms of the settlement of present claims were more favorable than the terms of the Global Settlement. CA 408a (uncontested District Court finding that the two are "roughly equivalent").

Fibreboard and Continental had settled numerous pending cases with other asbestos plaintiffs counsel. CA 315a-316a. All those cases having been settled, there was no reason for the parties to include them in a class consisting, by definition, of claims not yet settled.

That leaves the relatively small group of persons, not represented by class counsel, who had pending cases against Fibreboard on file in the courts.[30] That group was actually included within the prospective class negotiations until, following Judge Higginbotham's recommendation, class counsel finally determined not to include it in the class because they could not price a settlement that included a then rapidly moving target of present claims. CA 316a-317a, 326a-327a.

While the Scholars wax eloquent about the alleged breach of fiduciary duty on the part of class counsel in excluding this group from the *Ahearn* class, they nowhere explain (i) how either the group or the *Ahearn* class was hurt by its exclusion, (ii) what improper financial motivation class counsel could have had for excluding the clients of other lawyers from the class, and (iii) how class counsel can have had a fiduciary relationship with persons represented by lawyers other than themselves. Finally, in positing no legitimate rationale for the exclusion of pending cases from the *Ahearn* class (Sch. Br. 15), the Scholars also ignore the issues under the Anti-Injunction Act, 28 U.S.C. § 2283, that would have

[30] The exclusion from the class of those persons who had previously settled with Fibreboard subject to "cancer waivers" about which the scholars complain (Sch. Br. 16-17) was simply a function of the parties' definition of what were settled cases and, so far as the record shows, was not in any way based on some perceived financial benefit to class counsel or any other asbestos plaintiffs lawyers whose clients those persons had previously been. Moreover, other persons who had previously sued Fibreboard but had dismissed their claims and, like those who received "cancer waivers", retained the right to sue Fibreboard in the future upon the development of an asbestos-related disease are included in the class (JA 688a) despite being as likely to have a lawyer as the holders of "cancer waivers".

been presented by any attempt by the settling parties to enjoin the prosecution of cases pending in the state courts, which constituted the bulk of the unsettled cases excluded from the class. *See* CA 582a. Here, as everywhere else, the Scholars have ignored both the record in this case and the practical impact on the class of their theoretical arguments.

II. THIS CASE SATISFIES THE REQUIREMENTS OF ARTICLE III.

A. The Live And Adversarial Disputes Among The Parties Satisfy The "Case or Controversy" Requirement.

Petitioners contend that the settlement here violates Article III of the Constitution because "[i]n this case, there was no justiciable controversy *at any time*." Br. 48. This argument is based on a mishmash of false or misleading assertions that the parties were "friendly" not "adversarial" (Br. 47, 48) and that the action in which the settlement was entered was "feigned", a "pretext" and a "sham" (Br. 44, 45, 46). Petitioners make these assertions notwithstanding the undisputed facts that when this action was filed the class members here unquestionably had more than $1 billion worth of future claims against Fibreboard based on existing exposure to its asbestos containing products that were recoverable only out of insurance coverage disputed by Fibreboard's insurers, and even though Fibreboard and its insurers had been aggressively litigating these insurance disputes against one another for decades.

1. The Article III "case" or "controversy" requirement is met where an action involves "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). Article III thus requires that a federal action affect "tangible legal rights" and "touch[ ] the legal relations of parties having adverse legal interests." *ASARCO v. Kadish*, 490 U.S. 605, 619 (1989); *Aetna*, 300 U.S. at 240-41.

Here, the class, Fibreboard and the insurers had indisputably "adverse legal interests" as to whether, how much and by whom class members' future claims arising out of their existing exposure to Fibreboard's asbestos-containing products would get paid. The class's complaint accordingly alleges that the members of the class were injured by exposure to Fibreboard's asbestos products and that, absent the proceeds of Fibreboard's claimed insurance, they cannot be compensated; Fibreboard's answer denies the tort claims; and the insurers' answer and counterclaims deny that coverage is owed to Fibreboard and, thus, available to the class members. Indeed, petitioners have conceded that the class in fact could have litigated these very contentions consistent with Article III by "seeking a declaration of the plaintiffs' rights under those policies and any settlement thereof." Br. 16; *see Aetna*, 300 U.S. at 242-44 (action brought by an insurer for a judgment that no coverage was owed in the face of demands for provision of coverage met Article III requirements); *Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787, 789 (7th Cir. 1992) (Posner, J.) ("an insured's tort victim . . . has a legal right to protect his potential interest in the policy . . . that will support standing under Article III").

Nor was there was anything "hypothetical" about these disputes; to the contrary, they were actually being litigated at the time of the filing of this action, and would have continued to have been litigated absent the settlement in this case.[31] Equally so, the judgments of the courts below affect each party's "tangible legal rights" at issue in these disputes: those judgments provide class members with an enormous amount

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[31] Contrary to petitioners' insinuations about the settlement being a "contrivance among friends" (Br. 47), the negotiations leading up to the Global Settlement were marked by the same level of adversity among the parties. Without a shred of factual support, petitioners simply announce that the negotiations took the form of a "choreographed" proceeding among Fibreboard and "several cooperative plaintiffs' lawyers." Br. 44. This assertion is categorically at odds with the factual findings of the courts below. CA 327a-330a, 335a-336a, 347a-348a. Thus, petitioners' reliance on *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997) (Br. 47-48), is wholly misplaced.

of money from Fibreboard and the insurers to compensate them for their injuries, and in turn release Fibreboard and the insurers from further liability as to those injuries.

2. Petitioners do not dispute any of this. Instead, their derision of this case as a "feigned proceeding" and a "sham" (Br. 44, 46) derives principally from one thing: they contend that the indisputably real controversy among the parties was transformed into an unconstitutional "charade" (Br. 46) in violation of Article III because the "negotiations [of the settlement] involved not the resolution of *existing* legal claims for *actual* injuries, but the establishment of an elaborate ADR process to take control of *future* asbestos claims against Fibreboard." Br. 44-45.[32]

Petitioners base their contention that the settlement here affects primarily class members who "have no injuries and no ripe legal claims" (Br. 44) on their insistence that (i) the only claims of injury asserted in the complaint on behalf of the "exposure-only" majority of class members were for fear of cancer, enhanced risk of developing cancer and medical monitoring, (ii) those claims neither could nor were intended to be actually litigated, and (iii) the settlement provided no specific redress for those claims, Br. 45.

The fallacy of this contention – which is based on a mischaracterization of the complaint as pleading the coverage disputes only as "mere background" – has already been demonstrated at pages 24-26, *supra*, in connection with petitioners' identical arguments concerning the commonality

[32] Petitioners are clearly wrong in characterizing this settlement as creating a compelled alternative dispute resolution system that deprives them of their day in court. The settlement offer negotiation process established by the TDP, including non-binding mediation and arbitration, is ultimately consensual because if, in the prosecution of an individual claim, a class member is dissatisfied with the results of that process, he or she has an absolute right to sue the Trust in the tort system. JA 728a-741a.

and typicality requirements of Rule 23(a).[33] Petitioners' additional contention that the class could not have litigated the insurance disputes because they were the subject of other lawsuits – the coverage litigation in California and the *Rudd* action before Judge Parker – (Br. 46) simply ignores the facts that (i) the class was not a party in the coverage case and (ii) the *Rudd* action was brought *after* the *Ahearn* case and was based on the back-up insurance settlement that was itself a condition of the *Ahearn* settlement.

Petitioners also mysteriously assert that this case violates Article III because the relief in this action "'does not remedy the injury suffered'" by the exposure-only class members. Br. 47 (quoting *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1019 (1998)). We are simply at a loss to understand this statement. This action ensures that funds will be available to these class members to compensate them when their diseases do become manifest. Without this

[33] Petitioners also attempt to refute respondents' demonstration that any jurisdictional or other problems arising from any perceived failure of the complaint to adequately plead the class's claims with respect to the insurance disputes could be remedied by deeming the pleadings amended to cure such defects pursuant to Rule 15(b), Fed. R. Civ. P., and 28 U.S.C. ¶ 1653 by contending (i) that these claims were not "litigated" at the fairness hearing and (ii) that, in any event, those claims would not justify the settlement of the class members' "entirely *different*" personal injury claims against Fibreboard. Br. 46 n. 40. As to the first point, petitioners misconstrue respondents' argument, which is not that the insurance disputes were actually litigated at the fairness hearing, but rather that this Court can look to the fairness hearing for the purpose of ascertaining that the controversies that drove the settlement were the risks to the class posed by the continuation of the insurance disputes (for which causes of action could have been pled in the complaint) - a subject that was exhaustively examined at the fairness hearing. *See, e.g.*, CA 272a-276a. As to the second point, as shown at p. 27, *supra*, the class members' need to obtain Fibreboard's consent to an insurance settlement which captured the insurance proceeds for the class and not Fibreboard (unlike *Rudd*) justified their agreement to release Fibreboard from their personal injury claims which, contrary to petitioners, are not being "extinguishe[d]" but are rather being directed against the Trust in Fibreboard's stead.

action, the exposure-only class members would be, if anything, among those most injured by an unfavorable outcome of the coverage disputes. It is obvious that this action remedies this injury.

Ultimately, it appears instead that petitioners are trying to distort this Court's straightforward statement in *Steel Company* of the redressability component of standing – that an action must "remedy the injury *suffered*" – into the totally different proposition of an Article III bar on actions where the relief eventually awarded does not remedy the particular injury that was alleged in the *complaint*. Br. 45-47. They insist that this case violates Article III because the Global Settlement allegedly offers no relief for the "only" injuries supposedly pleaded in the complaint by exposure-only class members: "fear of cancer," increased "risk" of cancer and "medical monitoring" expenses. *Id.* This argument is not only flawed legally for the reasons set forth above, it has no basis in the facts of this case. Petitioners' bald assertion that the Global Settlement precludes recovery for risk or fear of cancer and medical monitoring (Br. 45) is simply false: the TDP makes quite clear that *any* claim, whether for a currently manifest disease or not, may be presented to the Trust; the Trust is then to determine whether the claim is compensable based on the principles of the applicable state law, and the claimant may sue the Trust in court if dissatisfied with that determination. JA 728a, 730a-731a, 737a-738a, 765a-766a.

3. Because of the stream-of-consciousness character of petitioners' Article III arguments, respondents are unsure whether petitioners are also reiterating the contention they made in the Fifth Circuit (which not even the dissent accepted) that the Global Settlement violates Article III simply because the parties negotiated and reached an agreement in principle on a settlement before the filing of the complaint, and the action was then "filed to obtain judicial approval of [the] settlement" rather than for litigation. Br. 45.

Rather than burdening the Court with a response to an argument petitioners appear not to be genuinely pressing, respondents would simply refer the Court to the rebuttal of

this contention contained in the brief in opposition to the petition filed herein by the insurers. *See* Ins. BIO 28-29.[34]

Moreover, the essential premise for any such argument by petitioners is lacking because the only "settlement" agreed to by the parties prior to the filing of the complaint in this case was the August 27 agreement in principle establishing a $1.535 billion price for the Global Settlement and requiring the negotiation of the back-up Trilateral Agreement. Most of the details of the Global Settlement – including the entire TDP – had not even been discussed, let alone agreed upon at that time; and other major conditions precedent to a formal agreement also remained to be satisfied, including the documentation of the back-up Trilateral Agreement. The lengthy, often bitter negotiations on these prerequisite matters all took place after the filing of the complaint. *See* CA 334a-336a; p. 14 *supra*. This Court has squarely held that tentative settlement agreements do not divest federal courts of Article III jurisdiction. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 465 n.3 (1978).

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[34] Petitioners' sole effort to distinguish *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), and the other consent decree cases relied on in the insurers' opposition, is the *ipse dixit* that the consent-decree context is different because the government would have supposedly instituted litigation had the decree not been entered, whereas in this case litigation supposedly would not have ensued absent the Global Settlement. Br. 47 & n. 41. The first of these assumptions is entirely speculative: petitioners obviously have no way of knowing whether the government in a particular case would have assumed the burden of a formal filing absent a consent decree, and neither *Swift* nor any of the cases following it relied on any such certainty as part of their rejection of the interpretation of Article III expoused by petitioners. The second of petitioners' assumptions, by contrast, is flatly false: as the District Court found in its very first finding of fact (CA 248a), litigation among the parties most definitively would have ensued absent the Global Settlement, if not under this precise complaint then in another form. Petitioners also assert, without any analysis at all, that the rule should be different where (as in consent decree cases) the federal government is involved. This Court, however, has rejected any relaxation of Article III where the government is a party. *See, e.g., Muskrat v. United States*, 219 U.S. 346, 361-62 (1911).

B. The Exposure-Only Class Members Have Injury-In-Fact.

Petitioners' final Article III contention is that the exposure-only class members lack injury-in-fact because they allegedly have no cause of action under "the substantive tort law of most states" to recover money damages now, before their diseases become manifest. Br. 48. In other words, petitioners assert that Article III bars these class members from doing anything to protect their undeniable interests in Fibreboard's insurance policies until their diseases actually surface years down the road – by which point, of course, the potential insurance may have been lost.

This focus on whether exposure-only class members could recover money damages immediately misses the point entirely. As the Fifth Circuit recognized, but as petitioners consistently fail to perceive, the purpose of this action was not to recover individual damages for class members now, but instead to protect their rights under the insurance policies to ensure the availability of funds when they do develop indisputably compensable diseases. CA 85a.[35] This case thus "does not purport to make any determination of the validity or amount of" exposure-only class members' claims; instead, it "address[es] the immediate and important controversy of whether [they] will be able to receive compensation for their injuries before Fibreboard runs out of money." *Id.*

Accordingly, the issue is not whether exposure-only class members had a cause of action for money damages as of the filing of the complaint, but whether they had standing to act then to protect their rights under the insurance policies and their future ability to recover against the immediate threat posed by the coverage dispute (or by implementation of the "inferior" back-up Trilateral Agreement). As the courts below recognized – and as petitioners apparently concede (Br. 16) – they plainly did.

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[35] As set forth above – and as petitioners appear to concede – it is clear that all class members had a cause of action under applicable California law to sue to protect their interests under Fibreboard's insurance policies. *See* p. 24, *supra*.

For example, this Court upheld a far more attenuated assertion of standing by exposure-only plaintiffs in *Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59 (1978). There, persons exposed to radiation from nuclear power plants sought immediate invalidation of a federal statute limiting the potential liability of the nuclear power industry in the hypothetical event of injuries arising from a nuclear accident, alleging that the statute's absence might discourage the power plants' owners from continuing the plants' operation, which in turn might reduce their risk of developing a radiation-related disease. *Id.* at 72-75. This Court stated squarely that the exposure to radiation, unaccompanied by present illness, constituted injury-in-fact "given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences [of such exposure]." *Id.* at 74. If these exposure-only plaintiffs had standing because this string of contingencies might result in diminution of a risk that one or more of them might eventually develop diseases, the exposure-only class members here thus assuredly had standing to participate in an action that would protect them from the immediate concrete risk of the coverage dispute.

For this reason, lower courts have held that exposure-only asbestos claimants and future potential beneficiaries of disputed insurance policies have Article III standing to sue to protect their sources of recovery. *E.g., In re UNR Industries, Inc.*, 20 F.3d 766, 770 (7th Cir. 1994); (Easterbrook, J.); *Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787, 789 (7th Cir. 1992). *See also In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d 1425, 1434 (2d Cir. 1993).

Any other approach would be completely inconsistent with settled law permitting future claimants to sue immediately as part of class or representative actions to protect rights that will ripen in the future. Future schoolchildren thus are regularly included in class actions designed to end desegregation or improve educational practices when they will ultimately attend school, as are future prisoners, future housing tenants and future employees in class

actions regarding conditions that will eventually affect them.[36] Similarly, representative actions to protect the future interests of unborn heirs and unborn or future beneficiaries of trusts date back centuries.[37] Future claims are paid and discharged in Article III bankruptcy proceedings, heretofore without running afoul of Article III.[38] None of these plaintiffs would have an immediate claim for relief – indeed, many would not even be alive at the time of suit. Accordingly, all of these practices would be invalid under petitioners' novel and insupportable contention.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be affirmed.

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[36] *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 192-193 (1991).

[37] *See, e.g., McArthur v. Scott*, 113 U.S. 340, 401-02 (1885); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

[38] *See, e.g., In re UNR Industries*, 20 F.3d at 770; 11 U.S.C. § 524(g). Since bankruptcy courts are subject to Article III, *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982), section 524(g) of the Bankruptcy Code would be unconstitutional under petitioners' view of Article III. *See* CA 176a n. 76. It is indeed ironic that what petitioners elsewhere in their brief insist is the course that should have been followed in this case – bankruptcy – would itself be unavailable on their view of the law.

Respectfully submitted,

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